IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR.

JUDGMENT

The State of Rajasthan. vs. Neemba Ram & Anr.

1. D.B.Cri. Appeal No.420/1986

Neemba Ram & Anr. vs. The State of Rajasthan

2. D.B. Cri.Appeal No.48/1985

Under Section 374 (2) Cr.P.C. against the judgment dated 05.02.85 passed by the Sessions Judge, Balotra,Camp Barmer in Sessions Case No.16/1984

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Date of Judgment: 19th September, 2007.

PRESENT

HON'BLE MR.JUSTICE BHAGWATI PRASAD
HON'BLE MR.JUSTICE MUNISHWAR NATH BHANDARI

Mr.P.R.Choudhary for the appellant.
Mr.JPS.Choudhary, Public Prosecutor.

BY THE COURT :(PER HON.MR.BHAGWATI PRASAD,J.)-

These two appeals have been filed, one by the State of Rajasthan against the acquittal of the accused persons under section 302, 147, 148, and 302/149 IPC and the other appeal has been filed

by the accused Neemba Ram and Nathu Ram against their conviction under section 304-II IPC and sentencing them to 5 years' R.I. and a fine of Rs.500/-.

The prosecution was initiated on the basis of a written report presented by Kump Singh at Police Station Chouhtan on 01.05.84. In the report it has been stated that Bhair Singh s/o Nathu Singh and accused Samartha had some dispute and, there were litigations pending in between them . On the fateful day the 5 accused persons , Nimba, Samartha, Natha, , Veerma and Dala armed with clubs , dharia and sword, made an unlawful assembly with an object to do away with Bhair Singh. When on the way Bhair Singh arrived near them the accused persons assaulted him with their respective weapons. When Bhair Singh shouted, witnesses PW/3 Lakh Singh and PW/9 Sujan Singh, who were on the way , came towards him and accused made their escape good. When they reached near Bhair Singh, they saw his condition. Due to the injuries, his condition was precarious. He was sinking. Before he succumbed to his injuries , he informed that out of the accused persons Neemba Ram with a sword, Nathu Ram with a dharia and the other three accused persons, namely Dala, Samartha, and Veerma with clubs , inflicted injuries to him mercilessly, and after informing

this he succumbed to his injuries. On the basis of such report, Incharge, Police Station, Chouhtan registered a case under section 302 , 147, 148, 149 and 341 IPC and formal FIR No.33 was registered.

Investigation was conducted and a charge sheet was filed against the accused persons in the court of Magistrate. The case was then committed to the trial court. At the trial , the trail Judge framed charges as follows, against the respective accused :-

> "1-कि आपने दि0 30/4/84 को दिन के 6.00 पी0 एम 0 पर या उसके लगभग मौजा सणाऊ में श्री भरसिंह पुत्र श्री नाथूसिंह जाति राजपुत निवासी सनाऊ की साशय हत्या कारित करने के लिये विधि विरूद्ध जमाव का गठन किया और इस प्रकार आपने भा.द.सं. की धारा 147 के अधीन दंडनीय अपराध किया।
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> 2- कि आपने उक्त समय, स्थान व दिन को या उसके लगभग विधि विरूद्ध जमाव के सदस्य के रूप में अपने आपको तलवार, धारिया व लाठियों से सज्जित रखा और इस प्रकार आपने भा.द.स. की धारा 148 के अधीन दण्डनीय अपराध किया।
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> 3- कि आपने उक्त समय, स्थान व दिन को या उसके लगभग श्री भेरसिंह पुत्र श्री नाथूसिंह जाति राजपूत, निवासी सनाऊ की हत्या कारित की और इस प्रकार

आपने भा.दं.सं. की धारा 302 के अधिन दंडनीय अपराध किया।

4- कि आपने उक्त समय, स्थान व दिन को या उसके लगभग आप व आपके साथी मुलजिमान विधि विरूद्ध जमाव के सदस्य थे और इस जमाव के सदस्य आपके साथी मुलजिमान निंबा ने तलवार से नाथा ने धारिये से व अन्य मुलजिमान ने लाठियों से भेरसिंह पुत्र नाथूसिंह जाति राजपूत निवासी सनाऊ की साशय हत्या कारित करने के लिये उसके चोटे पहुँचा कर उसकी हत्या कारित की और कारित अपराध ऐसा था जो विधि विरूद्ध जमाव के सामान्य उदेश्य को अग्रेसर करने में किया गया था अथवा वह अपराध ऐसा अपराध था जिसका किया जाना इस जमाव के सदस्य उस उदेश्य को अग्रसर करने में सम्भाव्य जानते थें, इस प्रकार आपने अपराध अन्तर्गत धारा 302 सपठित धारा 149 भा.दं.सं. किया।"

At the trail , prosecution produced 11 witnesses. 28 documents were exhibited by it. Defence produced 2 witnesses and 10 documents were exhibited by the defence. The accused are alleged to have caused following injuries to the deceased:-

1	*2*
2	Wounds :- position size & nature
3	Bruises & Abrasion,
	External Appearance -
1	Incised wound with clotted blood 1 1/2” above lt.eye brow horizontally.

1	*2*
2	Incised wound with clotted blood 1 1/2" above lt.ear upper margin & 13/4" above lt.eye outer margin.
3	Incised wound 1/2" x1/10"x1/5", 1/4" above lt.eye brow on frontal bone.
4	Abrasion 7'x1" on rt. Arm outer margin 2" below rt. Shoulder joint.
5	Abrasion 2 1/2" x1", 1 1/2" below abrasion No.4 on rt. Upper arm.
6	Abrasion 1/2" x 1/2" on base of little finger of rt. Hand outer side.
7	Abrasion 1/2" on rt. Hand thumb joint dorsal side.
8	Fracture of lt.upper arm mid shaft simple abrasion 2 1/2" x 3/4", 3-4" below lt. Shoulder joint.
9	Abrasion -7"x1 1/4" on lt.buttock with fracture of femur near hip joint back side with rupture of muscles.
10	Incised wound ½" x1/2" with hole on buttock posteriorly.
11	Abrasion – 7"x1" on rt. Hip joint 1/2" above the joint on back side.
12	Bruise 2"x1" on lt. Testis anteriorly
13	Abrasion 1" on lt.lower leg shaft 9" below lt.knee joint.
14	Abrasion 3/4" on lt. Ankle joint.
15	Incised wound 3/4" x1/3" x1/2" on rt. Leg on sole side 2" below rt. Foot little finger.
	Remarks by medical officer- Cause of Death -
	In my opinion Shri Bher Singh, s/o Nathu Singh, Rajput, aged 40 yrs. R/o Sanau died due to excessive bleeding from multiple injuries followed by shock.
	Head injuries & blood clots found under frontal & temporal bone)

The Medical Officer, conducting the post mortem report came to the conclusion that death was due to syncope which occurred due to excessive bleeding from multiple injuries leading to shock. The trial court, after considering the case of the prosecution , came to the conclusion that accused Dala , Samartha and Veerma cannot be said to be present at the scene of occurrence, because the weapons, which have been recovered from them in the form of clubs,

did not match with the splinters of the clubs which were recovered from the scene of occurrence.

Further, the trial court was of the opinion that the case, as stated by the two witnesses, PW/3 Lakh Singh and PW/9 Sujan Singh does not appear to be a correct depiction of the situation, as obtaining at the time of the occurrence. According to the trial court, the witness who had lodged the first information Report, PW/2 Kump Singh had lodged the report after being informed by the eye witness Lakh Singh . The niceties of the prosecution case, as has been brought forward at the trail , were not contained as depicted in the testimony at the trial. The learned trial court has further proceeded to discuss the testimony of PW/2 Kump Singh the witness, on the basis of whose information the first information report was lodged.

According to the trial court, if Bhair Singh died in presence of eye witnesses, then their going to village, instead of going to the police to report the incident, is an un-understandable character of the witnesses. The trial court has also noticed that the first informant was informed at the village. From village, if a person goes to Chouhtan, the scene of occurrence falls on way. If on way the

scene of occurrence was there, then it is not understandable as to why the first informant would not visit the scene of occurrence first and would straight away go to the police station and leave the dead body un-cared. The accused left the scene of occurrence without being pursued by the witnesses as claimed by them, though it is stated by the witnesses that the accused persons made their escape good after they shouted. If the accused had left after seeing the witnesses, then natural conduct of the witnesses would have been to follow the accused ,which was not done by PW/2 Kump Singh and PW/9 Sujan Singh. According to these witnesses , the accused had gone in different directions. This only exhibits that there was no assembly of accused as alleged by the prosecution. Because after the commission of crime the natural instinct of the accused would be to save themselves from a possible assault which would be made by the witnesses or their companions , if they had arrived.

The trial court has also noticed that there was an on going dispute in between the Rajputs and Bhils and this is a case where priorities have taken precedence over justice. The trial court found that the three accused persons cannot be said to be present., namely, Dala and Samrtha Ram and Veerma and the remaining two accused persons Neemba Ram and Nathu Ram inflicted injuries by

their respective weapons. The weapons have been found to be blood stained. The witnesses have spoken about their complicity. To that extent, the trial court has segregated the case of the accused persons. Out of the 15 injuries sustained by the deceased , most of the injuries are simple , except fracture of the left hand and femur bone of left side. No other fractures were involved. This depicts that the injured remained in that condition for a very long time, permitting the blood to trickle out of the injuries , resulting into shock and ultimately resulting into the death of the deceased.

From the nature of injuries, the trial court came to the conclusion that the offence under section 302 IPC would not be made out against the accused persons. The accused persons Neemba Ram and Nathu Ram and they are guilty of an offence under section 304 -II IPC. Thus, in ultimate conclusion , the trial court came to hold that the three accused persons, namely Dala, Samartha and Veerma are not guilty of any offence and Neemba Ram and Nathu Ram are guilty of an offence under section 304- II IPC. The other offences were not considered to be made out against the accused persons. The accused were sentenced for 5 years ' R.I. And a fine of Rs.500/- each. Against the decision of the trial court the State has filed the appeal to get the accused persons convicted under section 302/149

IPC and the accused Nathu Ram and Neemba Ram have appealed to get their convictions and sentences under Section 304- II IPC, set aside.

The learned Public Prosecutor, supporting the prosecution, stated that the case is made out from the statement of the eye witnesses. They have categorically stated about the participation of the various accused persons . The accused persons have been given specific weapons . Specific injuries, though was not possible to be assigned, because it is very difficult to observe as to which part of the body has been targeted by a particular accused. In absence of this kind of observations, if an omnibus acquisition is taken into consideration, then acquittal of the accused under section 302 IPC is not sustainable and calls for interference. In this background the trial court, according to the learned counsel, has gone wrong in acquitting the accused persons under section 302 IPC.

Per contra, the learned counsel appearing for the defence , has suggested that the entire prosecution case is a made up case. If these witnesses were eye witnesses in the case, then there was no question of the deceased, informing these two witnesses Lakh Singh and Sujan Singh that the accused have caused injuries to him by

assigning weapons to each of the accused. The very fact that an oral dying declaration has been sought to be brought into operation against the accused persons, is an effort on the part of the prosecution to create an evidence in the nature of dying declaration. If by chance, the court comes to the conclusion that the witnesses were not present then the oral dying declaration as incorporated in the first information report by the first informant could reasonably be considered a good basis for convicting the accused persons.

According to the learned counsel, this kind of attempt is an attempt to over reach the cannons of law, because the case was based on a written report. The report was filed by a person who was not an eye witness. The witness had met the alleged eye witnesses at the village, and from there the first informant had gone to lodge the report at Chouhtan. This is an admitted fact that when from the village anybody travels to Chouhtan he has to go from the side where the occurrence is alleged to have taken place. If the eye witnesses had known where the occurrence had taken place and they were the witnesses of the occurrence, then only this was possible. The whole scene appears to have been reconstructed, in the first information report and then the first information report has been fabricated to contain all the legal aspects of a criminal prosecution, ready to be

lodged.

The treatment as given by the trial court in discarding the story of the three accused persons, who are alleged to have the clubs, has rightly been discarded the on basis of the recoveries, as effected by the prosecution from the accused persons alleged to be clubs , because the splinters which had remained on the scene of occurrence had not matched these clubs.

A case against the two convicted accused persons has been made out to the tune of Section 304- II IPC because the exact nature of the assault was not known, and the prosecution having failed to bring in the correct situation before the court, if the court found that there were only two fractures and other injuries being simple, but death occurred due to uncared deceased by excessive bleeding, then the offence as has been made out, cannot be said to have been wrongly made out and the accused have rightly been convicted under section 304- II IPC. The accused have challenged their conviction by filing appeal.

The learned counsel for the accused submitted that the appeal of the State, deserves to be dismissed and that of the accused,

deserves to be allowed but he is of the opinion that since all the accused have remained for sufficiently long period , behind the bars , ends of justice would be met if the conviction of the two accused persons are maintained under section 304-II IPC and they are let off on the period already undergone. The acquittal of the acquitted accused, deserves to be maintained.

We have heard the learned counsel for the parties and have given our thoughtful consideration to the material available on record.

The first and foremost question in the case is, whether the eye witnesses could see the occurrence, as claimed by them. They were chance witnesses. The place of occurrence was not supposed to be one, where for any reason the witnesses ,as claimed by them, could be naturally present. If the witnesses were chance witnesses, then the story has to be scrutinised , to exclude the possibility of its fabrication.

The witnesses have claimed that they have seen the entire assault. If the assault was seen by them, then there is no question of the deceased informing them about the participation of

the accused, and then suddenly succumbing to his injuries. This shows that they have kept the deceased alive for their convenience and to procure an oral dying declaration from the deceased. This kind of over zealousness of the witnesses, is not an appreciable proposition which can be appreciated for considering their testimony.

The witnesses say that they had left the deceased on the scene of occurrence . They were two in number. If they had any concern to the deceased, then what stands to reason, is that the dead body would not have been left uncared. But as the testimony of PW/3 Lakh Singh and PW/9 Sujan Singh goes , they left the deceased uncared and went to the village , which is not a normal conduct. After going to village, it is alleged that they told two witnesses about the incident. From the village ,if anybody goes to Police Station Chouhtan, the scene of occurrence falls on the way. Normally PW/3 Lakh Singh would have tried to gather somebody from the village to be left at the scene of occurrence to care for the dead body. This having not been done , also raise a suspicion about the chronology of events, as stated by the witnesses.

Further, the three acquitted are alleged to have informed about the weapon of offence used by them. Incidentally, splinters of

the clubs have been recovered from the scene of occurrence. Those splinters do not match the recoveries as made by the prosecution. Such indicators only show that the prosecution has got such things recovered, which were not relevant, as far as the prosecution case is concerned and in that view of the matter, the irresistible inference which can be drawn is that prosecution was out to create pieces of evidence, to secure the conviction.

In that background, we are of the considered opinion that the order of acquittal ,recorded against the three accused persons, cannot be considered to be in any way perverse or conscious shaking. In that light of the matter, the acquittal of the three accused persons, namely, Dala, Samartha and Veerma, is not liable to be interfered.

As regards the case of convicted accused persons , namely, Neemba Ram and Nathu Ram, it will be worthwhile to note that the deceased, though had received number of injuries, but except the two fractures, all other injuries are simple. Two fractures are too, of such bones , which cannot be said to be bones of vital part, and in that view of the matter, if the two accused have been convicted under section 304-II IPC, then it cannot be said that, that is not a possible view in law. If a possible view in law has been taken

by the trail court, then in appeal against acquittal, it would not be appropriate to interfere. We are informed that these two accused persons were behind the bars for a period of ten months and 20 days. In that view of the matter, we consider that the period already undergone, would be sufficient to meet the ends of justice, as sentence of the offence for which they have been convicted.

In that view of the matter, the appeal of the State is dismissed and that of the accused appellants is partly allowed, as indicted above, to the extent of modification of sentence.

(MUNISHWAR NATH BHANDARI), J. **(BHAGWATI PRASAD), J.**

L.George